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Supreme Court of the United States

OCTOBER TERM, 1955

No. 439

IN THE MATTER OF GEORGE R. JOSLYN,
Bankrupt.

GEORGE R. JOSLYN,
Petitioner,

vs.

THOMAS HART FISHER,
Respondent.

BRIEF OF THOMAS HART FISHER, RESPONDENT, IN OPPOSITION TO PETITION FOR CERTIORARI.

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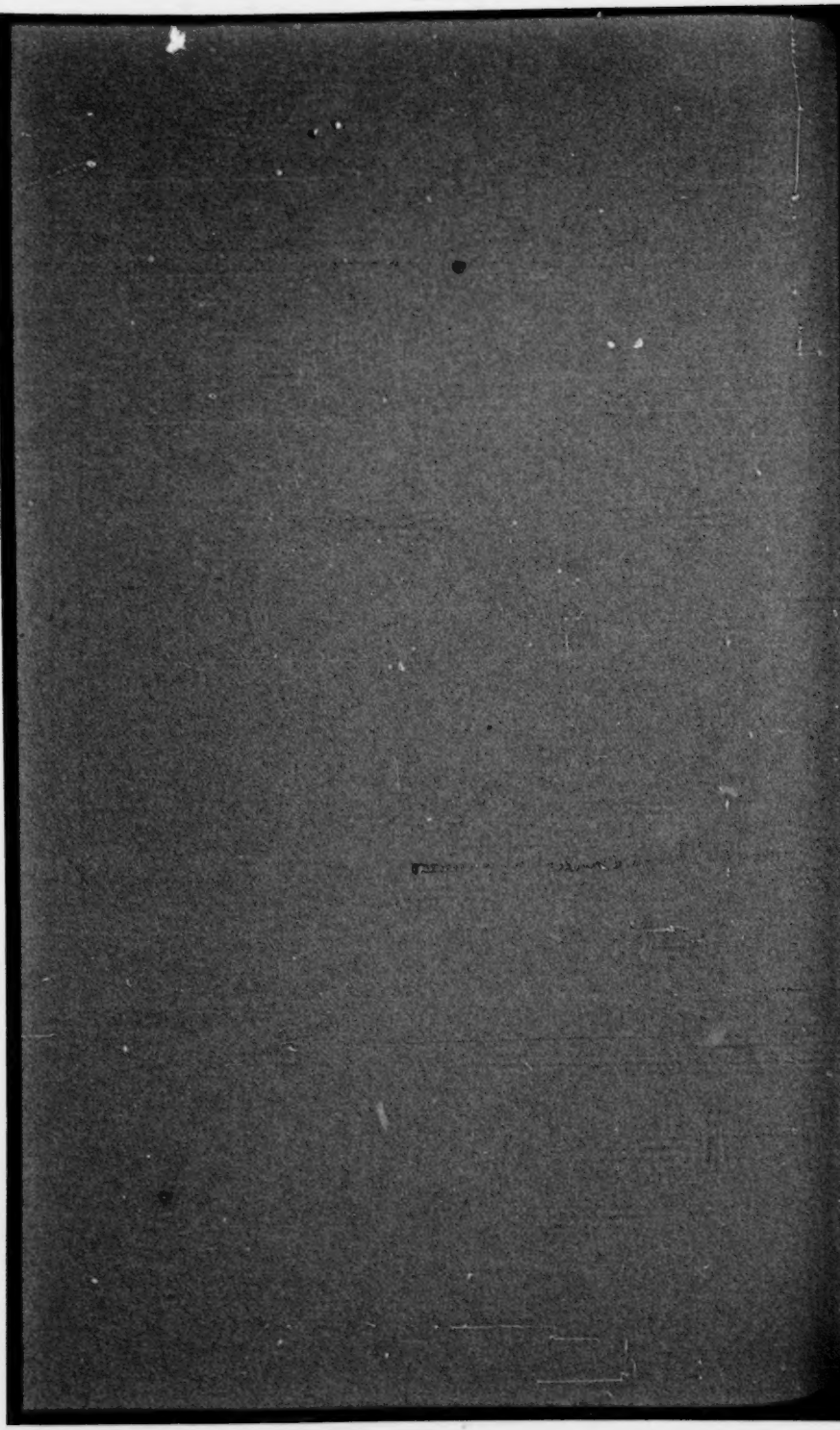

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BRIEF OF THOMAS HART FISHER, RESPONDENT, IN OPPOSITION TO PETITION FOR CERTIORARI.

It is difficult for us to believe that the petition for writ of certiorari is filed in this Court in good faith. Not only is there no final judgment in the court below, but no special or important reasons for granting the writ are disclosed in the petition as required by Rule 19 of this Court.

I.

There Is No Final Decision In The Court Below.

The sole effect of the decision of the Seventh Circuit Court of Appeals, as the opinion plainly indicates, is that the order appealed from be reversed and the cause remanded to the district court because the Joslyn bankruptcy involves a solvent estate and the issue as to Respondent's attorney's fees and expenses is an "adversary proceeding" between Respondent and Petitioner, citing *Watkins* v. *Sedberry,* 261 U.S. 571 (App. 3, 5). The court below held, therefore that the trial court erred in failing "to have the material issues between the parties defined" in the pleadings (App. 5-6).

As the court below expressed it (App. 6):

> "In our view the conclusion is inevitable that the District Court erred in its refusal or failure to formulate the relevant issue or issues prior to the hearing."

In the final paragraph of the opinion, the court below summarized its decision as follows:

> "The order appealed from is reversed and the cause remanded, with directions that the relevant issue or issues be determined as a prerequisite to and as a basis for a hearing and decision."

Thus the sole effect of the decision in the Seventh Circuit Court of Appeals was to remit the parties to the trial court in order that the pleadings might be straightened out and thereafter a hearing had and final judgment rendered upon the merits of the controversy.

This Court has repeatedly held that it will not grant a writ of certiorari to review a non-final judgment, such as one remanding a case to the District Court for an original or new trial upon the merits. As stated in *American Construction Co.* v. *Jacksonville T. & K. R. Co.,* 148 U.S. 372, 384, "this court should not issue a writ of certiorari to

review a decree of the Circuit Court of Appeals on appeal from an interlocutory order . . .'' See *Youngstown Co.* v. *Sawyer,* 343 U.S. 579, 584-5. This principle is too well established to require citation of further decisions to the same effect by this Court.

It is, of course, conceivable that after the District Court has straightened out the pleadings and adjudged the same upon the merits, no allowance of attorney's fees and expenses will be made to Respondent by the final judgment in the District Court. In that event, Petitioner would have no complaint or right of appeal at all, and the granting of the certiorari petition by this Court prior to such final judgment would be useless and unnecessary.

The requirement of finality of a judgment, as a condition to appeal, is based upon a strong general policy against allowing piecemeal appeals. The policy behind the rule is to discourage delays, to prevent the cluttering of appellate dockets, and to permit the correction by the trial court itself of its own errors. *Arnold* v. *United States,* 263 U.S. 426; *Collins* v. *Miller,* 252 U.S. 364; *Rexford* v. *Brunswick-Balke Collender Co.,* 228 U.S. 339.

As we point out below, what the petition below is really seeking is to have this Court reform the language, arguments and other expressions by the court below in its opinion, rather than the judgment of reversal itself.

The Supreme Court will not exert its jurisdiction merely to review questions of fact or expressions of opinion in the courts below. *Graver Mfg. Co.* v. *Linde Co.,* 336 U.S. 271, 275, and cases cited.

Respondent submits that the petition should be denied because there is no final judgment in the court below which can be made the subject of review in this Court by certiorari petition.

II.

The Petition Fails To Show Any Special Or Important Reasons For Granting The Writ Of Certiorari As Required By Supreme Court Rule 19.

It is fundamental that in order to warrant the issuance of a certiorari writ, there must be a substantial controversy or dispute. Subparagraph (b) of this Rule 19 indicates the various types of decisions of the Courts of Appeals which meet this requirement.

In construing Rule 19, this Court has repeatedly said that it is not and never has been primarily concerned with the correction of errors in the courts below, and that certiorari jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing. *Magnum Co.* v. *Coty,* 262 U.S. 159, 163.

Petitioner makes no attempt to show that any of the grounds for the granting of the certiorari writ defined in Supreme Court Rule 19(b) are applicable to this case. No contention is made that the decision in the court below conflicts with the decision of another Circuit Court of Appeals on the same matter. No adequate showing is made that an important state question has been decided in a way in conflict with applicable state law. There is no showing that an important question of Federal law has been decided which has not been, but which should be, settled by this Court. Nor is there any showing that the decision determined a Federal question in a way in conflict with applicable decisions of this Court. There is a contention in the petition that the exercise of this Court's power of supervision is called for, but no showing that the accepted and usual course of judicial proceedings has been departed from in this case.

We submit that this is not a case of peculiar gravity or general importance to the public interest, nor is the writ sought to secure uniformity of decision, and therefore the petition should be denied. Obviously, all that the petition seeks is merely to accord another hearing to the Petitioner as the party defeated in the Court of Appeals.

For failure to make any showing as required by Supreme Court Rule 19, we submit that the petition should be denied.

III.

The "Questions Presented" By Petitioner.

(1) The first question presented by the Petitioner is whether the ruling by the Court of Appeals that the District Court should formulate the issues and thereafter have a hearing upon the merits makes a "farce of judicial process."

The question answers itself. It was actually the order of the District Court denying Respondent his day in court (in accordance with the Referee's erroneous recommendation that Respondent had deliberately waived his claims to an allowance for fees and expenses) which was a "farce", especially in the light of the fact that Respondent's amended petition was sufficient to make a *prima facie* case and to cast the burden upon Petitioner of proving such of his so-called affirmative defenses as should be left in the pleadings after Respondent's motion to strike the same had been ruled upon (App. 5-6).

(2) Petitioner next maintains that both the Court of Appeals' holding that Respondent's amended petition complied with Section 62(d) of the Bankruptcy Act, as well as the assertion by the Court of Appeals that Petitioner was not contending otherwise, were erroneous (Pet., p. 6-8).

We think that the request for the writ of certiorari for the purported purpose of correcting such expressions as these in the opinion below is too trivial to warrant further comment, under the principle referred to in Point II above.

(3) Petitioner next maintains that there is an irreconcilable conflict between the present decision and a prior decision *of the same Circuit Court of Appeals* in determining whether certain creditors represented by Respondent were bankruptcy creditors having provable claims (Pet., p. 8), citing three Illinois Supreme and Appellate Court cases.

Not only is no showing made that these Illinois cases had any relevancy whatever to the question of provability of the claims of Respondent's clients in the Bankruptcy Court, but it is obvious that the Supreme and Appellate Courts of Illinois have no jurisdiction whatsoever to determine Federal bankruptcy issues, such as the provability of bankruptcy claims. (See paragraph (5) below.)

Moreover, a conflict between decisions of *the same Court of Appeals* in the same case, is *not* a ground for granting a writ of certiorari, in any event, since the later decision in point of time is considered controlling within that circuit. *Re Sandford Fork & Tool Co.*, 160 U.S. 247, *Thompson* v. *Maxwell*, 168 U.S. 451.

(4) As the fourth question presented, the Petitioner argues that a certain opinion in the Illinois Appellate Court contains "findings" which are "receivable in evidence in any proceeding" between Petitioner and Respondent, by which Petitioner means the proceeding in the Bankruptcy Court. Petitioner also cites from an expression of the Bankruptcy Court in a "written opinion" filed in the year 1948 (later reversed on appeal) which was critical of Respondent (Pet., p. 12-13, 16-20, 25).

Petitioner's theory (Pet., p. 26) is that the "findings" in the Illinois Appellate Court's opinion must be given "full faith and credit" in the Bankruptcy Court under 28 U.S.C., Section 1738.

Actually, of course, no hearing on the merits ever having been had in the District Court, there is no way to tell whether that court will (erroneously, as we say) give any weight to any of the so-called "findings" of the Illinois Appellate Court, or whether any of the attacks upon Respondent contained in the petition (which we say are wholly unfounded) will be sustained. In other words, it is premature to consider at this time the merits of any of these matters (see Point I above).

However, since the issue seems to be raised as to whether the "findings" in the Illinois Appellate Court are conclusively binding upon the Bankruptcy Court, we point out that the issues in the two courts are not the same. The findings in the Illinois Appellate Court were that Respondent was guilty of "unclean hands" in relation to certain Divorce Court fees, which issue was in no way involved in the Federal Bankruptcy proceeding. It is held that a charge of "unclean hands" in the Federal Court cannot be determined by the actions of the party so charged in any other proceeding. *American Cooperative Serum Ass'n* v. *Anchor Serum Co.*, 153 F. (2d) 907. The same rule applies in Illinois. A charge of "unclean hands" as a defense to an attorney's claim to fees and expenses cannot be effective by reason of any actions of the attorney unconnected with the specific case in litigation. *Mills* v. *Susanka*, 394 Ill. 439, and cases cited.

All that Petitioner's argument amounts to is an effort to anticipate and prevent a hearing and final judgment upon the merits in the District Court once the issues have been settled by the pleadings, merely in order to anticipate and interfere with the trial of the case upon the merits in the District Court.

(5) The petitioner argues that under Illinois law Respondent's employment contract is champertous (which we deny) and that the Illinois law must be conclusive upon the Bankruptcy Court to bar Respondent's right to recover fees and expenses.

No effort is made to meet the rule referred to in the opinion of the court below that the argument as to champerty is immaterial because, in any event, Respondent can recover his fees and expenses "on a *quantum meruit* basis", citing *Watkins* v. *Sedberry,* 261 U.S. 571. See also *Zweifel, Tuohy & Crager* v. *Trans-State Oil Co.,* 99 F. (2d) 650; *In re Tapp,* 65 Fed. Supp. 171, in all of which cases the Bankruptcy Court allowed compensation to an attorney, even though the employment agreement was champertous.

All that the Illinois law holds is that champerty is a defense to a suit upon a contract in an action upon the contract between the parties thereto. *Oil, Inc.* v. *Martin,* 381 Ill. 11. The Illinois cases cited by Petitioner (p. 13-14) were actions upon champertous contracts directly between the parties thereto.

Petitioner suggests (Pet. 14) that this Court has held that the rights of creditors of a bankruptcy estate are fixed by state law, citing *Vanston Bondholders Protective Comm.* v. *Green,* 329 U.S. 156. The *Vanston* case holds that what claims of creditors are *valid* at the inception of bankruptcy is governed by state law, but that what claims are *allowable* and how a debtor's assets shall be distributed in bankruptcy are exclusively within the jurisdiction of the Bankruptcy Court. Moreover, Petitioner is not a "creditor" of the bankruptcy estate. This Court has held that it is the Bankruptcy Court alone which has jurisdiction to pass upon attorneys' fees and expenses and that such jurisdiction is exclusive. *Brown* v. *Gerdes,* 321 U.S. 178;

Leiman v. *Guttman,* 336 U.S. 1. It follows that the Illinois Appellate Court can neither allow nor disallow bankruptcy fees, nor make any material determination with regard thereto.

The question of Respondent's right to attorney's fees and expenses is, as we have said, one which has not as yet been tried and adjudged upon the merits in the District Court. Everything said in the petition in criticism of the opinion of the Circuit Court of Appeals is therefore merely anticipatory to the final judgment which will ultimately be rendered in the District Court upon the merits.

CONCLUSION.

We submit that the petition for certiorari should be denied for lack of a final judgment upon the merits and as premature (see Point I above), and for lack of any special or important reasons therefor as required by Supreme Court Rule 19 (see Point II above).

Any further comment upon the petition in this case would, we feel, be unwarranted.

We ask the Court to consider this Brief in ruling upon Respondent's motion under Rule 56(4) for reasonable damages for delay.

We conclude that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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